No. 15,343.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

MIKE H. KOSTELAC and MARYLAND CASUALTY COMPANY, a Corporation,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

UNITED STATES OF AMERICA,
Appellant,

v.

MIKE H. KOSTELAC and MARYLAND CASUALTY COMPANY, a Corporation,
Appellees.

Appeals from the United States District Court for the Western District of Washington, Southern Division.

BRIEF OF APPELLANTS,

Mike H. Kostelac and Maryland Casualty Company.

EISENHOWER, HUNTER, RAMSDELL & DUNCAN,
Puget Sound Bank Building,
Tacoma, Washington,

TENNEY, DAHMAN & SMITH,
506 Olive Street,
St. Louis 1, Missouri,

Attorneys for Defendants-Appellants, Mike H. Kostelac and Maryland Casualty Company, a Corporation.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 1-4477.

SUBJECT INDEX.

Cases Cited.

Textbooks Cited.

Rules Cited.

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JURISDICTION.

The District Court was vested with jurisdiction of this cause, in which the Government is plaintiff (Complaint, Tr. 3-8), by reason of Title 28, U. S. Code, Section 1345.

This Court has jurisdiction to review the final judgment of the District Court (Tr. 81-83), by reason of the Notice of Appeal duly filed (Tr. 83-84), and under Title 28, U. S. Code, Section 1291.

STATEMENT OF FACTS.

This is an action by the United States against Mike H. Kostelac and Maryland Casualty Company, a corporation. The Complaint (Tr. 3-8) alleges execution of a contract between defendant Kostelac and plaintiff for removal by said defendant of garbage from Fort Lewis, Washington for five years (Tr. 4); furnishing of a bid bond therefor by defendant Maryland Casualty Company in the sum of $40,000 (Tr. 5); failure of defendant Kostelac to pay for certain of such garbage removed by him (Tr. 6); and plaintiff being obliged to enter into a new contract with one DeBoer to remove the garbage from Fort Lewis for the balance of the term of over 4½ years (Tr. 6); such relet price being $80,102.24 less than the price in Kostelac's contract; and the contract price of the garbage hauled away by Kostelac being $24,261.16, making a total claim of $104,363.40 against Kostelac, and $40,000 against the bonding company (Tr. 7), for which judgment was sought (Tr. 8). Defendants filed an Answer and Counterclaim (Tr. 9-18), alleging also among other things a mistake in the entering into the contract (Tr. 14-18).

The principal facts of this case are largely stipulated between the parties in the Pretrial Order (Tr. 53-73), or included in the Exhibits; testimony in the one-day trial was limited to that of defendant Kostelac (Tr. 107-176), who testified principally to a mistake in his Government contract and the steps he took after discovering the mistake; the deposition on Interrogatories of Lt. Col. Robert Ryer III (Tr. 97-106) for defendants, who testified on the principal factual question on the alleged mistake: that garbage at Ft. Lewis was not picked up daily prior to July 1, 1946, when he was Post Food Service Supervisor in charge of such matters (Tr. 100, 101, 103, 105, 106); the testimony of plaintiff's witness, John DeBoer (Tr. 177-191), principally to refute certain statements by defend-

ant Kostelac; and plaintiff's witness, Harry C. Ryan (Tr. 191-194), Chief Clerk at Fort Lewis at the time in question, who testified only that he was not present when the Contracting Officer and defendant Kostelac discussed the amount of garbage.

Defendant Mike H. Kostelac, prior to the year 1946, was engaged in the business of raising hogs at Gig Harbor, Washington, near Tacoma (Tr. 108). He had had three years' previous experience in hog farming, including collection of garbage from Jefferson Barracks in St. Louis, Missouri, and Scott Air Force Base at Belleville, Illinois (Tr. 109). For the one year period ending June 30, 1946, defendant Kostelac had a contract to haul the garbage from Bremerton Naval Base at a fixed price per ton to feed to the hogs on his farm; and the Bremerton contract ended on the date the contract in question at Fort Lewis began (Tr. 108).

Prior to June, 1946, defendant Kostelac had requested the Contracting Officer at Fort Lewis, Major P. P. Maiorano, to place his name upon the roster of bidders for the contract to haul garbage from Fort Lewis (Tr. 110). He intended to haul the garbage temporarily to his farm at Gig Harbor, and gradually convert his operations to a farm close to Fort Lewis, which he had arranged to rent (Tr. 140, 141, 173).

Some time before June 21, 1946, Kostelac received from the Contracting Officer at Fort Lewis a written Invitation to Bid (Tr. 58, 112), which Invitation (being part of contract W-4501-6SC-19 S 497 (Exhibit 1 herein), contains in General Provision No. 5 the following statement:

> "Inspection: Bidders are invited and urged to inspect the property to be sold prior to submitting bids. Property will be available for inspection at the times specified in the invitation . . . In no case will failure to inspect be considered grounds for a claim."

Paragraph No. 3 of the Invitation contains the following: "Inspection dates (see General Provision 5): June 21st to June 26th between the hours of 8 AM to 4:30 PM daily except Sat. and Sun." (Tr. 95). That the inspection by bidders of actual garbage containers, as urged by such written notice to the bidders, and also solicited verbally by Major Maiorano, the Contracting Officer for plaintiff (Tr. 58), was considered by the Contracting Officer an important procedure and step prior to letting the contract, in order to estimate the probable amount of garbage under existing conditions, practices and procedures, and defendant Kostelac was advised by the Contracting Officer of the importance of such inspection of garbage containers (Pretrial Order, Tr. 60, 118).

Defendant Kostelac was informed that inspection of the amount of garbage was important because the bid in question was to be based not upon a fixed price per ton of garbage which would require weighing, but was to be a bid, the price of which would vary according to the number of men stationed at Fort Lewis (Exhibit 1 and Tr. 174-176). In other words the bid by Mr. Kostelac, as requested by the Contracting Officer, and by the Invitation, set a certain price to be paid by Mr. Kostelac "per man per day," so that the amount owed by Kostelac for garbage picked up by him would be calculated by multiplying the unit bid price by the number of men at the time at Fort Lewis (Exhibit 1). It is conceded that this method of bidding was an innovation (Tr. 67).

Because the price to be paid by Kostelac for the garbage would depend upon the number of men, with no assurance as to the amount of garbage that might accumulate from feeding men at Fort Lewis, defendant Kostelac was told and realized the importance of careful inspection of the actual amounts of garbage that were being obtained at that time by one DeBoer (who then had the contract);

and this required examination of the garbage containers (Tr. 117-119). He therefore personally made inspections of garbage containers at Fort Lewis on four different occasions prior to submitting his bid for this contract; on two different occasions during the inspection dates of June 21 to June 26, 1946, referred to above, and also on two prior occasions that month in respect to a prior invitation (Tr. 112, 120-123). When Kostelac first received the invitation to bid on the contract in question, he proceeded in the morning (Tr. 112-113), keeping ahead of the garbage trucks which were carrying away the garbage from Fort Lewis under the contract with DeBoer then in effect. Defendant would keep seven or eight messhalls ahead of the garbage truck, talk to mess sergeants to learn the number of men at the particular messhall (Tr. 113), lean the garbage cans on end, and estimate from apparent weight, volume and appearance the approximate number of pounds of garbage per man per day resulting from operation of the particular messhall (Tr. 114). On that occasion he examined approximately fifteen or twenty messhall garbage containers in each of the three, four or five principal sections at Fort Lewis (Tr. 114). He came to the conclusion, based upon the amount of garbage examined, and the number of men fed at the messhalls, that the average accumulation of garbage equalled more than one pound per day for each man fed (Tr. 113).

Again on the date his bid was to be submitted, June 26, defendant Kostelac again went through the same procedure, going ahead of the trucks, examining about 40 garbage containers in all, and came to the same conclusion that there was regularly being accumulated each day more than one pound per man in garbage at Fort Lewis (Tr. 122-123).

Defendant Kostelac had, on the other two additional occasions in the same month of June, 1946, gone through

the same procedure of inspecting the garbage at messhalls at Fort Lewis, making a total of four inspections (Tr. 112, 120, 121).

The Contracting Officer for plaintiff "stated to defendant Kostelac, prior to his bidding on the contract, that the waste or garbage in said containers should represent a one-day's accumulation thereof" (Pretrial Order, Tr. 60, 115). Defendant Kostelac also knew that the contract for garbage collection covering the preceding year required that garbage be picked up daily at Fort Lewis, and the Contracting Officer in addition discussed with Mr. Kostelac the fact that such preceding contract required garbage to be picked up every day (Tr. 119). The contract then being bid upon by defendant Kostelac also required daily pick-ups (Exhibit 1), which defendant Kostelac knew (Tr. 119). In his discussions with Kostelac, Major Maiorano, the Contracting Officer for plaintiff, was not personally aware of any violations of the daily pick-up requirements, and personally assumed there were daily pick-ups; and accordingly he made the statement to defendant Kostelac that the waste in the containers should represent a one-day's accumulation of garbage (Tr. 60).

Defendant Kostelac relied upon such advice by the Contracting Officer in estimating the amount of garbage, and in preparing his bid proceeded upon the assumption that he had witnessed a one-day accumulation of garbage in the containers on all four of his inspections (Tr. 123). Defendant Kostelac was told at one time by Major Maiorano, the Contracting Officer, that his estimates of the amount of garbage that would be available under the prospective agreement (about 20 tons per day) were too optimistic (Tr. 59, 118, 128). He replied to the Major that he (the Major) had previously told Kostelac there were five or six trucks of garbage per day under existing operations, and each truck hauled four or five tons; whereupon the

Contracting Officer agreed that the 20-ton estimate was a fair figure (Tr. 118, 128). Because of the Major's statement about over-optimism, defendant Kostelac thereafter made the three additional inspections of the garbage containers (Tr. 128-129).

Thereafter defendant Kostelac submitted his bid, which he believed would be at the rate of approximately $4.00 to $5.00 per ton when the market price of hogs was down, up to a maximum of $9.00 or $10.00 per ton when the market price of hogs was high (Tr. 124). Later he discovered that in fact he had bid on a basis that would cost him approximately $20.00 per ton (Tr. 161). Previously Kostelac had paid $4.12 per ton at Bremerton (Tr. 146).

Defendant Kostelac testified that to his knowledge there was no other way he could check on the amount of garbage that would be anticipated under the contract, besides making the inspections which he in fact had made (Tr. 124). The results of his inspections, indicating over one pound per man per day, were generally in line with those experienced at Scott Air Force Base, Jefferson Barracks and Bremerton (Tr. 124), although there may be other differences caused by a cooler climate, and difference in type of food (Tr. 171).

There was a provision placed in the proposed contract by the government stating that the estimated amount of kitchen waste per man per day is .04 pounds (Exhibit 1 and Tr. 124). Defendant Kostelac had discussed this provision with Major Maiorano, the Contracting Officer (Tr. 126-128). The Contracting Officer took Mr. Kostelac to the Food Disbursing Office at Fort Lewis, and Kostelac was told that this provision is in all Government contracts of this type, that no one could ever explain it and that it simply had to be put in the proposed contract (Tr. 127). The Contracting Officer told Kostelac to disregard this

provision in making his bid, which Kostelac did, in fact (Tr. 128). He had calculated that if such estimate of .04 pounds per man per day were correct, this would indicate an average accumulation of garbage of less than two-thirds of an ounce per man for three meals (Tr. 126), and he told the Contract Officer that the peelings off one potato would be more than that (Tr. 127), to which the Contracting Officer agreed and laughed (Tr. 128). The contract also contained a provision that it was in no sense conditioned on either the amount of waste to be collected, the number of kitchens or families, or the number of men subsisted from time to time (Exhibit 1).

Defendant Kostelac was the only bidder on the contract in question, and the price bid by him on June 26, 1946 was higher than any other comparable bids ever received at Fort Lewis, either before or after the day of said contract (Pretrial Order, Tr. 64).

Defendant Kostelac entered upon performance of the contract in question on July 1, 1946. On the first few days of operation under the contract, the garbage cans were so full, or over-flowing, that the trucks were unable to cover the entire Fort on any of those days (Tr. 130). On about the 5th day, however, defendant Kostelac found that he obtained only ten or eleven tons, when he first collected garbage from the entire Fort in a one-day period (Tr. 130, 131). And the garbage cans were only about half as full as when he had examined them in preparing his bid (Tr. 172-173). Kostelac immediately contacted Major Maiorano, the Contracting Officer, and told him that "something looked funny"; that the garbage was not there (Tr. 131). The Contracting Officer said he was going to investigate (Tr. 131). Also, Kostelac was asked by a mess sergeant, "What, are you picking this up every day now?" (Tr. 131, 132.) Thereafter defendant Kostelac contacted Major Maiorano, the Contracting Officer, over a dozen

times about the apparent mistake (Tr. 134). He went to the Contracting Officer and wanted him to see if they could do something about the mistake (Tr. 132). Defendant Kostelac told the Contracting Officer he had been misled, that the garbage was not picked up every day when he had examined the containers, and he had bid on the expectation of obtaining twice the amount of garbage, since it was a two-days' accumulation of garbage he had examined, instead of a one-day accumulation (Tr. 132). The Army Officers at Fort Lewis said they were not authorized to do anything about the mistake, but would have to refer it to higher Army authority in San Francisco (Tr. 138). Thereupon the Contracting Officer and Mr. Kostelac drew up another contract to be sent to the Sixth Army Headquarters in San Francisco for approval (Tr. 132). This new contract was on or about July 24, 1946, and provided a new (renegotiated) price to said contract at a reduced sliding scale submitted by defendant Kostelac; such contract was subject to the approval of the Headquarters, Sixth Army, but upon referral of the contract to said Headquarters or on about August 2, 1946, said Headquarters made the determination that the plaintiff had certain rights under the previous contract that could not be released by the War Department (Tr. 61, 62). Such decision was confirmed by the Director of Service, Supply and Procurement in Washington, D. C., on or about September 27, 1946. That while negotiations were being carried on, defendant Kostelac "persistently pursued efforts to have the Government modify, adjust or cancel his contract, addressing his communications in that respect to both the military and congressional authorities" (Pretrial Stipulation, Tr. 61). His attorney had given written notice to the Contracting Officer on July 18th, 1946 that Kostelac considered he had made a mistake, and advising of the difficulties of operating profitably from so small an amount of garbage (Tr. 61, 133). The attorney's letter requested that either

the contract be corrected, or that defendant Kostelac get out of the contract (Tr. 133). The officers at Fort Lewis would never tell Kostelac whether or not they agreed with him that the garbage cans had been misleading (Tr. 138). Defendant Kostelac flew to the Sixth Army Headquarters in San Francisco twice; the first time the office was being moved, and the second time, two weeks later, he was told to go to Washington, D. C., which he did (Tr. 133). He was unable to find anyone in Washington who knew anything about the contract, and was told to go back to St. Louis, and return to Washington in two or three weeks and contact his Congressman, Mr. M. L. Price (Tr. 133). Mr. Price's secretary accompanied defendant Kostelac, and spent two days on the matter; no one in Washington was able to find the files for him, and no one had any information about his case, or helped him in any respect; this was also true of San Francisco (Tr. 134). Mr. Kostelac spent over $2,000 on these trips (Tr. 136-137).

In drawing up the proposed new contract for defendant Kostelac, the Contracting Officer had asked him how much he thought the price should be per man per month, if Mr. Kostelac bid on the basis of examining a two days' supply of garbage rather than a one day supply; defendant Kostelac and the Contracting Officer drew up a sliding scale that was not exactly a bid, but a "proposal for a bid, or something," the way the Contracting Officer explained it; the Contracting Officer drew it up himself, and stated to defendant Kostelac, "I will send this to Frisco" (Tr. 135). This new proposed contract was, in fact, sent to San Francisco by the Contracting Officer with his recommendation that it be approved by the Government (Tr. 135).

During the period these negotiations were going on concerning the contract, defendant Kostelac continued to pick up the garbage from Fort Lewis, and did so until the

Contracting Officer notified him on November 27, 1946, that December 15, 1946, was to be his last day (Exhibits 4 and 5 and Tr. 140). Defendant Kostelac had had discussions with Major Maiorano, the Contracting Officer, as to whether Kostelac should continue to take the garbage out of Fort Lewis during this period, and the Contracting Officer told him he had to, and told him that it would go against Kostelac a lot more if Kostelac defaulted on the contract and stopped hauling the garbage (Tr. 140). For the first three or four weeks Mr. Kostelac was able to use about two-thirds of the garbage at his Gig Harbor farm, before his new farm was to be built at Troy, Washington, near Fort Lewis (Tr. 140-141), but thereafter he was compelled to dump all of the garbage during the entire period to December 15th, at a complete loss to defendant Kostelac (Tr. 158, 173).

On December 15, 1946, the Government re-let the contract to DeBoer for $80,102.24 less than Kostelac's price for the rest of the term.

John DeBoer, who has had the garbage-hauling contract at Fort Lewis about 24 years (Tr. 185) except for very brief periods when Kostelac and another man got the contract (Tr. 186), and who took over again when Kostelac's contract was ended in December of 1946 (Tr. 188), testified for the Government that before the Kostelac contract he got 35 to 40 tons of garbage a day from Fort Lewis (Tr. 180); that there had been complaints that his drivers had not picked up garbage (Tr. 181); that as a rule this was because of foreign material in the garbage (Tr. 182); that DeBoer, himself, never picked up garbage at Fort Lewis (Tr. 183); that he fed about 6,000 hogs in June, 1946 (Tr. 182), but that he would also feed his hogs grain, besides the garbage (Tr. 183); that he used to get paid to haul away the garbage, and he believed it was as recently as 1945 (Tr. 186); and in response to a brief

question by the Court, he testified that he had dismantled his hog ranch on July 1, 1946 (Tr. 191) and had laid off his men; that the Government only contacted him 48 hours ahead of time in December, 1946, and that the price he offered to pay, and bid for garbage for the remaining 4½ years on the contract was a low price because he would have to dump a certain amount of garbage initially in setting up the farm again (Tr. 191).

Harry Ryan testified for the Government that he was Chief Clerk at Fort Lewis when the contract in question was let, and that he never heard Major Maiorano make any representation as to the amount of garbage; but that he was not always present when the Major and Mr. Kostelac talked (Tr. 192-194).

The Court in its opinion (Tr. 195-199), Findings of Fact, Conclusions of Law and Judgment (Tr. 74-83), found "no question" that Kostelac had made an error in his bid, but "felt obliged to hold" defendants Kostelac and the Bonding Company liable for the contract price of the garbage from July 1, 1946 to December 15, 1946 (an agreed total of $30,716.18, including interest) on the theory that Kostelac had not promptly rescinded or requested rescission of the contract (Tr. 78). The Court stated that under the circumstances it was persuaded that no further damages (of the $104,363.40 plus interest of about $30,000 sought by plaintiff) should be allowed (Tr. 79). An appeal to this Court was taken by defendants on August 7, 1956, and a cross-appeal taken by plaintiff, the Government, on August 16, 1956 (Tr. 83-85).

SPECIFICATION OF ERRORS.

Defendants contend that the trial Court erred in finding that defendant Kostelac had lost his right to rescind his contract, and that the Court's Findings (Tr. 74-80) in that regard are erroneous on the several grounds listed immediately below in the Summary of Argument, under Point I; that the Court's decision was based upon matters not pleaded or set out in the Pretrial Order herein (Point II, infra); that liability on the bond was not proved (Point III, infra); and that the Findings of the trial Court on this equitable counter-claim may be reviewed and modified by this Court (Point IV, infra).

SUMMARY OF ARGUMENT.

I. DEFENDANT KOSTELAC DID NOT LOSE HIS RIGHT TO RESCIND THE CONTRACT BY REASON OF WAIVER, ACQUIESCENCE OR ESTOPPEL.

A. The Lower Court's Decision Is Based Upon an Erroneous Assumption of Fact.

B. Defendant Kostelac's Conduct Was at All Times Consistent With His Claim That the Contract Should Be Rescinded.

C. Defendant Kostelac Reasonably Assumed That the Government Was Not Insisting Upon Immediate Strict Cancellation or Rescission.

D. During the Period in Question Defendant Kostelac and the Government Were Negotiating a Settlement.

E. Both the Government and Said Defendant Expected and Intended a Delay in Submitting the Tangled Contract to Higher Governmental Authorities.

F. Defendant Kostelac Was Expressly Told by the Contracting Officer to Continue Collecting Garbage Pending Efforts to Correct the Contract.

G. Defendant Kostelac Was Also Morally Obligated to Continue Hauling Garbage Pending Settlement.

H. Said Defendant Did Not Have Knowledge of Facts Requisite to Create Waiver.

I. To Bar Defendant Kostelac From This Relief Would Be Extremely Inequitable Under the Circumstances.

J. There Is No Issue as to Any Failure by Defendant Kostelac to Act After November 27, 1946.

II. THE DEFENSE OF WAIVER, ACQUIESCENCE AND ESTOPPEL IS NOT AVAILABLE BECAUSE NOT PLEADED AND NOT IN PRE-TRIAL ORDER.

A. Such Defense to Plaintiff's Counterclaim for Rescission Was Not Pleaded by Plaintiff.

B. The Pre-Trial Order Listed All the Issues, and Contained No Provision for Such Contention.

III. PLAINTIFF MAY NOT RECOVER ON THE BOND IN THIS CASE.

IV. THIS COURT MAY REVIEW AND MODIFY THE FINDINGS OF THE TRIAL COURT ON THE ISSUES HEREIN RAISED.

ARGUMENT.

I. DEFENDANT KOSTELAC DID NOT LOSE HIS RIGHT TO RESCIND THE CONTRACT BY REASON OF WAIVER, ACQUIESCENCE OR ESTOPPEL.

A. The Lower Court's Decision Is Based Upon an Erroneous Assumption of Fact.

Before arguing the merits of this question, as to whether there was a "waiver," "acquiescence" or "estoppel," we wish to make it clear that such issue was never pleaded in this case, was not among the specific issues stipulated and agreed to with finality in the Pretrial Order herein, and therefore should not be considered in this case. However, we discuss this matter as Point II, because of our equally strong conviction as to the merits of this issue of acquiescence, which we believe is supported by long lines of legal authorities and precedents.

The lower Court in this case first of all rightly found upon overwhelming evidence that the contract between defendant Kostelac and the Government was voidable by said defendant by reason of mistake (Paragraphs V and X, Findings of Fact, Tr. 76, 78-79):

> "There is no question but that defendant Kostelac made an error or miscalculation when he prepared his bid. . . . It seems to the Court that Kostelac might well have secured appropriate relief by rescission had he promptly sought it, that there may well have been a substantial and important mistake as to the quantity of garbage that might be expected from the Fort. . . ."

The Court, however, went further, on an issue never injected into the case by the pleadings, Pretrial stipula-

tion or by any evidence, as follows (Paragraph VII, Findings of Fact, Tr. 76-77):

> "In this instance, defendant Kostelac did not demand either rescission or reformation. What he sought in effect was renegotiation which was a matter for the administrative judgment and discretion of the Army authorities and not a matter for the Court. It is not within the province of the Court to renegotiate a contract for these parties."

The Court's reluctance to so rule is indicated by the language in the opinion (Tr. 197-8):

> "Now this brings us down to the proposition that without demanding rescission or reformation, which, of course, was never applicable anyway, but at most asserting renegotiation which was refused ultimately by the Army authorities, Mr. Kostelac continued with the collection of the garbage until December 15, and *I feel obliged to hold that in doing so, this collection was under the contract which had not been rescinded and which Kostelac hadn't asked to be rescinded.*" (Emphasis supplied.)

We submit that this ruling of the lower Court is in error for all nine reasons set out in this Point I (any one of which would be sufficient to permit relief to defendants).

First, we respectfully submit that this holding is based upon an erroneous assumption or fallacy concerning one fact in particular. This erroneous assumption of fact is that "defendant Kostelac did not demand either rescission or reformation," but that he merely sought "renegotiation" of his contract. This error is conclusively established by reference to the *stipulated and agreed facts* as set out in the Pretrial Order, Paragraph 18, page 61 of the transcript, as follows:

> "That defendant persistently pursued efforts to have the Government *modify, adjust OR cancel his said contract . . . AND* during which time, on or about July 24, 1946, defendant Kostelac undertook renegotiation of his contract with the Contracting Officer at a reduced sliding scale submitted by him, which renegotiation was subject to its approval by the Headquarters Sixth Army . . ." (Emphasis supplied.)

This alternative demand of Kostelac was also in exact accordance with a letter sent by Kostelac's attorney to the Contracting Officer in July, 1946, requesting that *"EITHER" the contract be corrected or rescinded* (Tr. 133).

We submit that there simply can be no question about this stipulated fact that defendant Kostelac asked in the alternative for a correction of the contract price *OR* a cancellation or rescission of the contract. And the alternative nature of the demand is not changed by reason of the fact that the first step thereunder was taken by the Contracting Officer, who submitted for approval of the Sixth Army Headquarters a new written contract, drafted by the Contracting Officer, which would correct this mistake in the price of the garbage (Tr. 61-62, 132, 135).

There is, of course, a tremendous difference between a case of notifying the other party to a contract that, in the alternative, you must either have the contract price corrected *or* the contract cancelled or rescinded, and a case where a person makes no claim to a rescission of the contract, and by his words or conduct leads the other party to believe that he is willing to proceed under the existing contract, and is merely asking, as a favor, that his contract price be increased. The latter is apparently what the lower Court assumed Mr. Kostelac was doing, whereas the former is conclusively established, by the agreed evidence, to have been Kostelac's stand at all times in question herein.

B. Defendant Kostelac's Conduct Was at All Times Consistent With His Claim That the Contract Should Be Rescinded.

The ruling of the lower Court in this case that defendant Kostelac lost his right to rescind, is in a field in which the law is extremely well settled by ample precedents on all phases of the problem. We, therefore, first seek basic definitions of this type of defense to rescission. The terms used in cases involving such loss of rights are defined as "waiver", "estoppel", "acquiescence" or "election", and are summarized in *Herman On Estoppel and Res Judicata,* Vol. 2, page 1157, Sec. 1029, as follows:

> "The same rules are applicable as to election, acquiescence and ratification. . . . Election, ratification and acquiescence are prominant elements in the creation of equitable estoppels and may be consolidated under the general term of estoppel by conduct."

The exhaustive treatise by *Black on "Rescission and Cancellation"* Vol. 3, Sec. 608, pp. 1469-70, similarly defines such a defense to rescission:

> "Without explicit admissions or declarations, an estoppel to rescind may be raised against a party in consequence of his acts or conduct amounting to a ratification of the contract, *or which are consistent only with the theory that he recognizes it or ratifies it.*" (Emphasis supplied.)

Kerr on "Fraud and Mistake", 6th Edition, l. c. 432, summarizes the defense as follows:

> "It is not necessary, in order to render a transaction unimpeachable that any positive act of confirmation or release should take place. It is enough if proof can be given of a *fixed and unbiased determination not to impeach the transaction.* This may

be proved either by acts, evidencing acquiescence, or by the mere lapse of time during which the transaction has been allowed to stand. The proper meaning of acquiescence is quiescence under such circumstances *that assent may be reasonably inferred from it. It means being content not to oppose.*" (Emphasis supplied.)

We believe and contend that from these very basic definitions of a waiver of rights in this type of situation, defendant Kostelac has not waived, abandoned, or acquiesced in this voidable contract. The record is replete with protests by this defendant. When he first received a suspicion that a mistake had been made, he immediately contacted Major Maiorano, the Contracting Officer (Tr. 131). His attorney wrote the Contracting Officer requesting that *either* the contract be corrected *or* rescinded (Tr. 133). Mr. Kostelac thereafter contacted the Contracting Officer over a dozen times (Tr. 134). As stated above, the parties have stipulated that thereafter "defendant *persistently pursued efforts* to have the Government modify, adjust *OR* cancel his said contract" (Tr. 61). The parties have stipulated that the Contracting Officer in fact approved correction of the mistake, and sent a new contract to the Sixth Army Headquarters (Tr. 61). As shown in the statement of facts, defendant Kostelac made two trips to San Francisco and two trips to Washington, D. C., finally even calling in his Congressman, in making every effort during the delay period to correct the mistaken contract as the equitable alternative to rescission (Tr. 133-134).

What more could Kostelac reasonably have done to make it clear that he *did not acquiesce* in the mistaken contract?

Considering the circumstances and the surrounding situation known to both parties, it would have been bizarre, if not utterly fantastic, for defendant Kostelac to have

acquiesced. This is not a case where a buyer (and Kostelac was a buyer of garbage in this case) has a debatable decision to make whether or not to go ahead with a voidable contract. Here, to go ahead with the contract obviously meant *complete ruin and bankruptcy to Kostelac*, by paying for five years a price not only stipulated to be "higher than any other comparable bids received at Fort Lewis" (Tr. 64), but shown to be a price more than twice the value of the garbage: about *$20.00* per ton instead of *$8.00 to $10.00* (Tr. 161). That this suit is for $104,363.40 on a contract originally estimated by the Contracting Officer at a gross figure for all garbage of $200,000 (Ex. 1, p. 1) brings this point home vividly.

The Washington Supreme Court has held protests much weaker than those made by Mr. Kostelac will be construed as sufficient notice of a desire to rescind. In *Schroeder v. Hotel Commercial Co.* (1915), 84 Wash. 685, 147 Pac. 417, the defendant, purchaser of a defective piano, did not at any time specifically request rescission (return of the piano), much less demand it. He merely argued about the defect (considerably less vigorously than Kostelac protested the mistake in this case). The seller (an agent, like the Contracting Officer in this case) took up the matter with higher authority (his principal), just as the Contracting Officer did in Mr. Kostelac's case. The buyer refused to make payments on the voidable contract pending the dispute, just as Kostelac also refused to do on his contract involving a mistaken price (Pretrial Order, paragraph 7, Tr. 55, paragraph 8, Tr. 55-56, and paragraph 18, Tr. 62). The delay in that case was for 1½ years, as compared to about four months in Kostelac's case. And there were no alternative demands in that case like the one made by Kostelac.

Referring to (1) the buyer's *protesting* about the defect, and (2) his *refusal* to pay, the Court squarely held (l. c. 420, Pac. Rep.):

"This IN ITSELF was, under the circumstances, a sufficient notice of the rescission."

We therefore believe that, according to basic definitions thereof, an utter lack of acquiescence, waiver or estoppel is established with finality by the agreed facts in this case.

C. Defendant Kostelac Reasonably Assumed That the Government Was Not Insisting Upon Immediate Strict Cancellation or Rescission.

The lower Court in this case, in Paragraph VII of the Findings of Fact (Tr. 77), has held that defendant Kostelac should have "taken the position promptly and within a reasonable time that there was no contract at all because of the alleged mistake," and should have "then *demanded* that the contract be declared at an end and that he be freed from its obligations. . . . " (Emphasis supplied.)

As stated in our Point I, B, we believe defendant Kostelac did take a definite stand (meantime giving the Government a choice of alternatives). Further, we believe that the Court overlooked agreed facts in this case that demonstrate there was no necessity for such an arbitrary, adamant and uncompromising attitude on the part of defendant Kostelac, because of the view and approach of the other party to the contract, the Government Contracting Officer.

The agreed facts show that almost immediately after the matter was brought to the attention of the Contracting Officer, efforts were undertaken to make a fair adjustment in the contract because of the mistake, and *within a few days* of the prompt written notice from the defendant Kostelac's attorney, a proposed new contract was *actually drafted by the Contracting Officer* and forwarded to his superior authorities in San Francisco (Tr. 135).

Under such circumstances it would have been entirely out of keeping *and utterly reprehensible* if defendant

Kostelac had during this period made some harsh demand upon the Government, when the Contracting Officer was at that very time undertaking to remedy the mistake in the contract in an obviously equitable fashion.

The rule that a purchaser or contractor need not make a formal demand for rescission when the other party appears to be remedying the situation has long been established by the Courts. *Black on Rescission and Cancellation,* 2nd Ed., Vol. 2, Sec. 544, p. 1344, excuses failure of a buyer to insist on rescission where he

> ". . . labored under a mistaken impression that . . . *he would be able to obtain redress in other ways and without the necessity of suing for rescission.*" (Emphasis supplied.)

From long ago the precedent in *Rheinstrom v. Elk Brewing Co.,* 28 Pa. Super. Ct. 519, has ruled in analogous chattel cases that:

> "The purchaser of a defective machine will not be held to a prompt rescission where he has been misled by the seller into believing that a prompt rescission would not be insisted upon."

And in analogous corporate stock cases, it is stated in Cook on Corporations (8th Ed.), Vol. 1, Sec. 162, p. 542, that:

> "Acquiescence or affirmance does not bind the stockholder [whose subscription was obtained by fraud] *if induced by a reasonable expectation on his part* that the fraud would be remedied." (Emphasis supplied.)

(We hasten to mention that the great majority of rescission cases involve fraud or active misrepresentation, and that of course, in quoting such cases, we do not intimate or suggest any such conduct in the present case.)

In the Delaware case of *Dietrich v. Badders* (1913), 4 Boyce 499, 90 Atl. 47, where the statements of plaintiff

were the reason for failure to return a defective mare immediately, the Court found that prompt rescission was unnecessary since

> " . . . the *plaintiff* [seller] has then waived her right to have the mare returned within the time that first might be considered reasonable after the defendants discovered that she was not sound" (l. c. 51, Atl. Rep.).

The most abundant analogous cases setting forth this rule of law are found in the long line of cases involving return of defective merchandise or chattels. Typical of all these authorities is *Salina Implement & Seed Co. v. Haley,* 77 Kan. 72, 93 Pac. 579. The Court there found that under the circumstances in that case the defendant-purchaser was not to be expected to return the machine while tests were being made on it to see if it could be made to work. Although the "testing" of the machine by that particular buyer covered an unusually long period of time, the Court in no uncertain language held that:

> "*The plaintiff* [*seller*] *is hardly in a position to insist* that the test [of the machine by the buyer] was unreasonably long *when it and its agents were assisting Haley* [defendant-buyer] *in making the test until the last day,* and holding out assurance that they could remedy the defects. . . . " (Emphasis supplied.)

The Courts have frequently found that the seller in such a situation, either intentionally or entirely unintentionally, may have "lulled the purchaser into a sense of security" either by acts or deeds. Typical of such cases is *Stone v. Molby Boiler Co.* (N. Y., 1921), 195 App. Div. 68, 185 N. Y. S. 651, where the defendant claimed that plaintiff (purchaser of a defective boiler) had "waived his right to repudiate the contract" by not demanding rescission for a long period of time. The Court found that the purchaser in that case (like Mr. Kostelac in the present case)

left no stones unturned during the alleged delay period to make the boiler work, and that the seller had also cooperated in this effort. Overruling the seller's claim of waiver, the Court stated emphatically (l. c. 655, N. Y. S. Rep.):

> " . . . *There is a rule, as old as the law of any civilized nation,* that when by acts or statements one party lulls another into a sense of security as to his existing right, *such party cannot then take advantage of the other party, to his detriment and thus advantage the alluring party, in his own behalf, to destroy those rights.*
>
> "Under the circumstances the holding of the jury that he did not give notice of his rescission within a reasonable time, *was against the weight of the evidence . . . The plaintiff did everything he could, working, according to suggestions and instructions of the defendant to make the boiler a success.*" (Emphasis supplied.)

D. During the Period in Question Defendant Kostelac and the Government Were Negotiating a Settlement.

The Courts hold very closely to the established principle that a person having the right to declare a contract void does not lose that right by alleged acquiescence, waiver or estoppel, when his alleged failure resulted from good faith negotiations to settle the difficulty or correct the defect in the contract.

Indicative of how far the Courts will go in refusing to penalize a buyer in such a case is the decision in *La Force et al. v. Caspian Realty Co.* (1928), 242 Mich. 646, 219 N. W. 668. In that case real estate was sold to plaintiff by metes and bounds at a time when the ground was covered with snow. Upon the snow melting it was found that twenty feet of the ground was occupied by another house, previously sold by defendant to another party. Protracted

negotiations were undertaken, whereby defendant made an effort to obtain for plaintiff twenty feet from an alley on the other side of the property. At no time did defendant give any assurances to plaintiff that such substitute strip could be obtained. Defendant even tried to get the city to vacate the alley, and thereafter rested many months without taking any further action. Meantime plaintiff proceeded to make improvements on the premises, rent the premises, and make payments on the purchase price to defendant. Despite all this, the Court refused to hold that plaintiff had waived his right to rescind the contract (l. c. 669, N. W. Rep.):

> "But it is said that plaintiffs, under use and occupation, inclusive of receipt of rentals and also in making improvements, could not, after many months, rescind. *During negotiations toward an amicable adjustment of acknowledged and just rights of plaintiffs* to have the land sold them or the quantity thereof supplied, they had the right to use the property in their possession, take the avails thereof inclusive of rentals, maintain the status quo by payments on the contract, *all subject however to judicial adjustment if amicable adjustment failed and rescission followed.* (Emphasis supplied.)

Waiver under similar circumstances was claimed in the case of *In re Impel Mfg. Co.* (U. S. Court of Appeals, 6th Cir.), 200 Fed. (2d) 112. The opinion of the lower Court (108 Fed. Supp. 469), specifically approved on appeal, also refused to penalize the plaintiff in that case, since he delayed because he was

> ". . . putting forth efforts or carrying on *negotiations to obtain a compliance with the contract, restitution OR a peaceful settlement.*" (Emphasis supplied.)

A situation quite analogous to the case at bar is found in *Berry v. Wood, etc., Mach. Co.* (St. L. Ct. of App., 1895),

62 Mo. App. 41 (no Regional citation), where the plaintiff bought a defective machine through the local agent of defendant. Having a right to rescind the agreement, plaintiff made an offer to the agent that he would keep the machine for one year if the agent's principal (defendant) would insure its proper working; otherwise plaintiff would return it. Just as the Contracting Officer in the present case submitted Kostelac's request for alternative action to his higher authority (the 6th Army Headquarters), so in the *Berry* case, the agent submitted the alternative proposition to his principal. The purchaser was held not to have waived or lost his right to rescind because of his inaction during the period of such negotiations.

In *Fred Macey Co. v. Macey*, 143 Mich. 138, 106 N. W. 722, where the party entitled to rescind the contract waited for two years and was claimed thereby to have waived his right, the rule was stated that all that was necessary was that such party

> ". . . protested promptly after discovering the fraud, and entered into negotiations for a peaceful settlement which failed" (l. c. 727, N. W. Rep.).

E. Both the Government and Said Defendant Expected and Intended a Delay in Submitting the Tangled Contract to Higher Governmental Authorities.

It is perhaps an understatement to say that both the Government and Kostelac expected a substantial delay in submitting the unusual problems raised by this contract to higher Governmental authorities, in view of the well known (and necessary) procedural requirements or red tape before a Government contract can be so modified. And it is, of course, common knowledge that during all this time from July to December, 1946, shortly after the end of the war, these Government agencies were flooded with termination negotiations almost beyond comprehen-

sion. Into this setting was injected the case of the contract of Mike Kostelac. Of course, both parties expected Mr. Kostelac not to give up collecting garbage while this delay was being incurred and the Contracting Officer directed him to continue collection of the garbage (Tr. 140). The whole purpose of submitting the mistake to higher authority was to see if by a fair and equitable change in the mistaken contract price Mr. Kostelac could not be enabled to carry out his long five-year contract. Certainly, the actions of the parties, if not their words, also, evidenced a *clearly implied understanding* such as the following:

> "We will try to work this out fairly, and if we fail, it will then be a question for the courts as to whether Mike Kostelac will be liable for this high price for garbage in view of the mistake."

Many courts, including the Washington courts, have dealt with analagous situations where delay was to be expected. In *Macey et ux. v. Furman et ux.* (1916), 90 Wash. 580, 156 Pac. 548, the deed described the wrong real estate and the sellers requested time to see their lawyers. They did nothing, however, for eight months and at the trial claimed that inaction during that period by the buyers constituted an estoppel and laches. At page 549, Pac. Rep., the Supreme Court of Washington stated:

> "*Respondents were justified in waiting a reasonable time for an answer.* The answer never came . . . Appellants by their own inaction inducing respondents to delay are estopped to invoke that delay as an estoppel against rescission. Nor did respondents' failure to abandon possession of the land estop them to rescind." (Emphasis supplied.)

So, also, in the case of *Read v. Loftus* (Kans., 1910), 82 Kan. 485, 108 Pac. 850, another case involving defective title to real estate, the parties both agreed to and contemplated that a suit to quiet title, or some other proceeding

would be taken by the seller. Almost a year elapsed, in which the seller did nothing. It was held that the buyer had not thereby waived his right to attack the contract as voidable. The language on page 852 (Pac. Rep.) shows the similarity between the delay there and the delay in the present case as the matter was being submitted to higher authority:

> "The nature of the remedy which they (sellers) proposed, namely, a suit to quiet title, *would necessarily require time and a reasonable delay for that purpose should not be construed as a waiver until some act was done or notice given evincing an intention to refuse to comply with the promise.* (Emphasis supplied.)

Delays that are foreseeable by the parties ordinarily present an excuse for a buyer failing to take action. Somewhat analogous, also, are cases involving defective products, where long delays may be expected in order to determine whether the products will be made to work. Hence, in the very recent case of *Telex, Inc., v. Schaeffer* (Ct. of Appeals, 8th Cir., April, 1956), 233 Fed. (2d) 259, where the buyer of radios tried for a long time unsuccessfully to make them work, the Court indignantly ruled (l. c. 202):

> "*It comes with poor grace* for appellant [seller] now to urge that appellee should be denied a recovery for his *patient efforts* to make a success of the appellant's wares." (Emphasis supplied.)

F. Defendant Kostelac Was Expressly Told by the Contracting Officer to Continue Collecting Garbage Pending Efforts to Correct the Contract.

On page 140 of the Transcript the testimony shows that Major Maiorano, the Contracting Officer, directed defendant Kostelac to continue to haul the garbage from Fort Lewis pending the efforts to adjust the contract price.

The Contracting Officer went even further, and made a veiled threat that "it would go against" Mr. Kostelac if he stopped hauling the garbage during that period (Tr. 140). It is of course logical that the Contracting Officer would want defendant Kostelac to continue hauling the garbage during such period, because the whole purpose of forwarding the matter to the Sixth Army Headquarters was to permit Kostelac to continue at the right price.

The Courts have frequently dealt with a situation where a request by one party has been the cause for inaction by the party entitled to avoid the contract. The decisions have often been quite strongly worded in such cases. In the case of *Randal v. Mitchell Motorcar Co.* (Penna., 1919), 263 Pa. 428, 106 Atl. 783, the Court expressed its views as to whether one making such a request could thereafter claim the other party had waived rescission. The Court said flatly (l. c. 784, Atl. Rep.):

> *"He who request another to act, or not to act, cannot punish that other for complying with the request."* (Emphasis supplied.)

Counsel for the seller in that case argued against the rule that a person may thus be lulled into security. As to this contention of counsel, the Court stated that it is:

> ". . . *neither good law nor good morals, so far as relates to a delay, as here, at the request of defendant.*" (Emphasis supplied.)

A Law Review Note in 15 Nebraska Law Bulletin 198-200 discusses this situation in connection with the case of *Slagle v. Securities Investment Corp.* (Nebraska, 1936), 268 N. W. 294, involving an innocent misrepresentation concerning a defective truck. In discussing the law in such case, the writer states (l. c. 199):

> "Delay in exercising the right to rescind does not operate as waiver of such right *where the delay is*

caused by the seller or representor, and since it was induced by the adverse party he cannot take advantage of a delay which he himself has caused or to which he has contributed. Absent this qualification the seller could make promises and attempts to fix the chattel for a sufficiently long time and by such inducements *destroy the buyer's right of rescission.*" (Emphasis supplied.)

The Law Review writer states that the Slagle case "is supported by the weight of authority. *Analysis of the facts shows that no other position would be equitable.*" (Emphasis supplied.) The writer then collates the numerous leading decisions on the exact point, including *Schroeder v. Hotel Commercial Co.* (1915), 84 Wash. 685, 147 Pac. 417.

G. Defendant Kostelac Was Also Morally Obligated to Continue Hauling Garbage Pending Settlement.

We earnestly submit that if defendant Kostelac had, upon becoming suspicious that there was a basis for declaring his contract invalid, arbitrarily, selfishly and contrary to the Contracting Officer's request, and without giving the Government an opportunity to do the fair thing, quit the job completely, taking away all his trucks and refused to carry away the accumulating garbage at Fort Lewis, he would be guilty of acting as no honorable or fair-minded person should act. He had been the only bidder on this particular contract, the other qualified person having disbanded his hog farm on July 1, 1946 (Tr. 191). There had fallen into his hands the responsibility for avoiding an unsanitary, if not dangerously unhealthful situation for approximately 40,000 American soldiers, and we can but suggest that it is to Mr. Kostelac's credit that he took this responsibility seriously, as the evidence showed he was doing a much more thorough job than had been done in the past (Tr. 103).

The Supreme Court of Washington has passed upon a very analogous situation in the case of *Bishop v. T. Ryan Construction Co. et al.* (1919), 106 Wash. 254, 180 Pac. 126, where the plaintiff, like Kostelac, had a contract to haul materials: in that case sand, gravel and cement used in the construction of a road. The defendant committed a breach of contract which permitted plaintiff to cancel the hauling contract. However, plaintiff continued to haul for some time thereafter, even though not requested to do so there. We submit that the Court's dealing with the alleged defense of waiver under those circumstances has a definite bearing on the situation in the present case (l. c. 131, Pac. Rep.):

> "He (plaintiff) testified, and his testimony is all that there is upon the question, that he continued to so haul because the contractor was then actively engaged with a crew of men in the prosecution of the work, *and no one else had been employed to take his place,* and he did not wish to cause any greater annoyance or loss to the contractor than he could reasonably avoid. Clearly this ought not to be held a waiver of his cancellation of the contract . . . *it was but the exercise of common decency, and certainly the law will be slow in penalizing such an act.*" (Emphasis supplied.)

We believe that the act of continuing to haul the garbage, as strenuously requested by the Contracting Officer, was not only common decency on the part of Mr. Kostelac, but in contemplating the chaos that would result from rotting garbage all over the camp, we believe that defendant Kostelac has fulfilled a compelling moral obligation. And when it is considered that during nearly all the time in question he had to dump the garbage at a complete financial loss to himself (Tr. 158-159, 173), it would seem most unfair to subject him to further penalty.

H. Said Defendant Did Not Have Knowledge of Facts Requisite to Create Waiver.

Even if defendant Kostelac had in fact acquiesced in the mistaken contract price (which we deny, and which the evidence also refutes), such acquiescence would still not be a bar to his right to avoid the contract, since defendant did not have full knowledge of the facts.

We refer here specifically to the question of whether or not the garbage which defendant Kostelac examined prior to bidding on four different occasions represented a one-day accumulation or a two-day accumulation, on which clear proof would be a sine qua non for rescission. We now know, after the trial of the case, by the positive and irrefutable deposition testimony of Col. Robert Ryer (Tr. pp. 97-106) that the garbage was not picked up daily, but every other day. Col. Ryer, who was Post Food Service Supervisor (Tr. 98), was the one man at Fort Lewis who was fully in charge of this phase of mess hall operation under the Contracting Officer, including receiving and investigating complaints (Tr. 98).

Defendant Kostelac was in an entirely different position from the Government as to knowledge of such fact. All he could tell, when the quantity of garbage was less than he had estimated, was that "something looked funny" (Tr. 131). Then Kostelac encountered a Mess Sergeant who expressed surprise at daily pick-ups, and made the remark, "How come you are picking it up every day?" (Tr. 132.) Mr. Kostelac confronted Major Maiorano, the Contracting Officer, who stated that he would investigate the matter and find out about it (Tr. 131). On the matter of the attitude of the Army Officers at Fort Lewis after defendant Kostelac's claim of mistake was made, the following questions were put to defendant (Tr. 138):

> "Q. Did you talk to them [the Army Officers at Fort Lewis] at that time as to whether or not the garbage cans had been misleading?

A. Yes, I did.

Q. *And did they tell you their views on that, whether they agreed or disagreed with you?*

A. *No, they didn't.*''

Although defendant Kostelac was thus left completely in the dark as far as proof of operations inside the camp were concerned, he was caused to feel that he was right, since the Contracting Officer recommended that the contract be changed, and forwarded this recommendation to his superior officers in San Francisco, together with a new contract, actually drafted by the Contracting Officer, subject to such approval (Tr. 132, 61).

That same doubt as to the facts which were peculiarly in the knowledge of the officials at Fort Lewis continued almost to the date of trial of this action. Apparently the Contracting Officer never made complete proof available even to the United States Attorney in this action, since the U. S. Attorney could at the most stipulate only as to the:

> '' . . . *inability* [of Army officials] to ascertain whether or not daily pick-ups of garbage were actually made . . . '' (Tr. 64)

and

> '' . . . that the Government admits *it may be the fact* that all the garbage was not picked up every day at the time and place in question'' (Tr. 60).

And the information given to the United States Attorney indicated only:

> '' . . . that the Government was unable to find any witness or evidence to refute the contention of the defendant Kostelac that pick-ups of garbage at such time and place were not made daily'' (Tr. 59).

As will be seen from the record, such limited concessions by the Government on this issue made it perilous to our

defense of rescission for mutual mistake to attempt to set aside this contract without "clear and convincing proof" of such mistake. We thereupon immediately took the deposition of Col. Ryer, the top officer under Major Maiorano at Fort Lewis, whose name was divulged to defendants in this action (Tr. 32) after a long and painful process of interrogatories, investigations and Motion to Compel Answer to Interrogatories (Tr. 27-32).

The testimony of Col. Ryer, set out in the Transcript on pages 97 through 106, removes any suggestion of a doubt on the subject of how frequently garbage had been picked up at the time in question. Col. Ryer was in full charge of this particular matter at Fort Lewis, is still in the service of the Government (Tr. 97), and would have no motive to falsify or exaggerate under these circumstances, and was qualified by his own personal observations made at Fort Lewis every day during about half of his hours on duty. The garbage simply was not picked up daily. The lower Court was so convinced by this testimony, and the testimony of Mr. Kostelac that the Court stated in Paragraph V of its Findings of Facts:

> "*There is no question* but that defendant Kostelac made an error or miscalculation when he prepared his bid on the contract for garbage removal from Fort Lewis. . . ." (Emphasis supplied.)

Under these circumstances, during the period subsequent to July 1, 1956, defendant Kostelac was lacking in the convincing proof required by the law to set aside the contract for mistake, although the Government, through Col. Ryer, the head of this department, had full knowledge of the facts to establish this right of rescission in Mr. Kostelac. In fact Col. Ryer was contacted in the summer of 1946 in an *investigation by the Government* on this exact question in connection with the Kostelac contract (Tr. 103-104).

Under such circumstances, the Courts unanimously hold that even if the party entitled to rescind expressly waives or acquiesces in the contract, his right to rescind cannot be lost until he acquires this knowledge and proof requisite to rescission, which the other party possesses.

The United States Supreme Court has specifically passed upon this exact point, in language leaving no doubt on the subject. In the case of *Pence v. Langdon* (1878), 99 U. S. 578, 25 L. Ed. 420, involving a rescission of the sale of mining stock because of misrepresentations, acquiescence or waiver by the purchaser was set up as a defense to rescission. On page 581, the Court stated:

> "Before the plaintiff was required to affirm or rescind the contract, he must be shown to have had actual knowledge of the imposition practiced upon him. It is not enough to show that he might have known or suspected it from data within his reach. . . .
>
> "Acquiescence and waiver are always questions of fact. There can be neither without knowledge. . . . *Current suspicion and rumor are not enough. There must be knowledge of facts which will enable the party to take effectual action. NOTHING SHORT OF THIS WILL DO.*"

The United States Supreme Court has even applied this doctrine to a case of ignorance of the *law,* in *College Point Boat Corp. v. United States* (1924), 267 U. S. 12, 69 L. Ed. 491. In that case the Government authorities were wholly unaware of the fact that they could terminate a particular contract without paying anticipated profits, and went to great lengths to close out the contract on a different basis. In spite of all the Government had done, *the Court still permitted it to set up this defense when suit was brought against it,* holding that rights could not be waived unless the party involved fully understood those rights (l. c. 16):

"Ignorance of its right doubtless prevented the Navy Department from taking, shortly after the Armistice, the course which would have resulted legally in cancelling the contract at that time. But the right to cancel was not lost by mere delay in exercising it. . . ."

In *Mudsill Mining Co. v. Watrous* (U. S. Court of App., 6th Cir., 1894), 61 Fed. 163, where a waiver of the right to rescind was also claimed, the Court held that such waiver could not be found until such time as the buyer's belief had

". . . acquired the solid foundation of knowledge" (l. c. 185).

In *Humbert v. Larson* (1896), 99 Iowa 275, 68 N. W. 703, the defendants were sued on notes executed for the purchase of a stallion. The defendants had some rather good evidence of the physical incapacity of the animal, since they knew that the plaintiff previously had attempted to sell it, but had been required to take it back from that previous purchaser. Obviously defendants were waiting to see how the animal turned out. The plaintiff strenuously opposed the defendants' plea to rescind the contract, saying that "by reason of their (defendants') delay they elected to stand by and perform their contract." After observing that defendant may have had suspicions concerning the animal, the Court remarked that:

"Defendants were not, under such circumstances, required to act upon mere rumors or suspicions. They were justified in waiting further developments."

Numerous authorities are also assembled in 9 *American Jurisprudence,* "Cancellation of Instruments," Sec. 47, p. 391.

I. To Bar Defendant Kostelac From This Relief Would Be Extremely Inequitable Under the Circumstances.

If it could be found (which we urgently deny) that defendant Kostelac somehow did not follow the path of greatest wisdom when suddenly confronted with this baffling experience, we sincerely believe that the penalty put upon him in this case becomes entirely unfair when all equitable considerations are weighed in connection with Mr. Kostelac's equitable counterclaim. The prompt action by the defendant when he discovered that something "looked funny" (Tr. 131), his constant pestering of the Contracting Officer to get the facts (Tr. 134, 132), the stipulated fact that he "persistently pursued efforts to have the Government modify, adjust or cancel his said contract, addressing his communications in that respect to both the military and congressional authorities" (Tr. 61), his spending about $2,000.00 in making all the long trips (Tr. 136-137), his frustrating experiences with large bureaus that were unable to give him any answer, and referred him to other bureaus (Tr. 133), his straightforwardness in telling the Government that he asked *either* for a correction of the mistake, *or* the rescission of his contract (Tr. pp. 61, 133), the dire consequences of complete financial ruin that would result from waiver of this defense, because of the enormity of the contract entered into in error, the fact that the Government would obtain only a windfall if it prevails (getting over twice the usual value of the products being sold), the fact that the Government through Col. Ryer, its top assistant to the Contracting Officer in this particular field, and through its own Investigating Committee, had full knowledge of facts which it did not disclose to the defendant (Tr. 103-104) and the fact that the defendant was acting just the way the Contracting Officer wanted him to in continuing to carry away the garbage, and avoid any danger to the health of the 40,000 troops, and finally, that Mr. Kostelac acted

at all times the way any man of honor and integrity would act when confronted suddenly with a terrible situation which was not the result of any fault on his part.

Equitable considerations of this type were the basis for the decision in *Strother v. Lehigh et al.* (1911), 151 Iowa 214, 130 N. W. 1019, where the buyer of real estate that seemed to have a defect in the title made the mistake of actually bringing suit himself to remedy this defective title, alleging in that action that she was the owner of the property. The Court, however, refused to recognize the otherwise obvious application of the doctrine of waiver in such a case. Conceding that such action by the buyer might ordinarily be considered a waiver of the right to rescind, the Court concluded that

> ". . . it would be inequitable to so treat it in this case."

That reasonable latitude is given in a proper case is shown in *Black on Rescission and Cancellation,* 2nd Ed., Vol. 2, sec. 546, p. 1348:

> ". . . while one seeking to rescind is ordinarily required to act with reasonable promptness, a liberal extension of this rule is allowable *where the delay has not been willful nor exercised for an unfair purpose.*"

J. There Is No Issue as to Any Failure by Defendant Kostelac to Act After November 27, 1946.

Thus far we have considered only whether defendant Kostelac should have taken any particular action during the period of some four months between the time of his first suspicion of the mistake (Tr. 131) and November 27, 1946, which was the date upon which the Government formally made its finding against Kostelac and notified him that Kostelac's contract was being re-let on December 15, 1946 (Exhibits 4 and 5 and Tr. 55).

It is probably axiomatic that at all times after November 27, 1946, there was no need for Kostelac to notify the Government that he would not continue under his contract, or that he considered the contract cancelled; nor did he need to bring legal action. The contract was, in fact, put to an end by the Government, and the only question remaining was the legal consequence thereof in view of the mistake in the contract.

So that there can be no uncertainty about this point however, and so the picture will be complete, we point out that there has never been the slightest hint, intimation or suggestion of criticism of Kostelac by the Government or by the lower Court in this action on the ground that defendant Kostelac should have taken any action after November 27, 1946. There is not a word in the pleadings, the motions, the stipulated facts and issues in the Pretrial Order, the evidence, the opinion of the Court, or the Court's Findings of Fact or Conclusions of Law. This simply was not in the case, and, accordingly, evidence was not introduced as to any negotiations between Kostelac and the Government after November 27, 1946, as to whether the Government should bring suit after waiting five years (the end of the original contract), whether a declaratory judgment suit could be brought, etc., etc.

That defendant Kostelac could assert his equitable claim to rescission in a suit by the Government on the contract, in the event the Government decided to try to collect under all the circumstances, is also Hornbook law. *Professor Pomeroy* in *"Equity Jurisprudence,"* Fifth Ed., Vol. 3, Sec. 868, pp. 380-381, states:

> "I shall . . . enumerate the various modes in which the equitable jurisdiction may be exercised, and the various forms of remedy which may be granted, on the occasion of mistake. . . . The jurisdiction may be exercised either *defensively* or *affirmatively*. . . .

In States which have adopted the reformed procedure, the equitable jurisdiction may also be invoked, if necessary, by defendants in legal actions. This may be done by means of equitable defenses which simply defeat the plaintiff's legal cause of action, or by means of equitable counterclaims or cross-complaints which demand for the defendant some affirmative relief, as reformation or cancellation." (Emphasis is by the author.)

II. THE DEFENSE OF WAIVER, ACQUIESCENCE AND ESTOPPEL IS NOT AVAILABLE BECAUSE NOT PLEADED AND NOT IN PRE-TRIAL ORDER.

A. Such Defense to Plaintiff's Counterclaim for Rescission Was Not Pleaded by Plaintiff.

Plaintiff's reply to the counterclaim of defendant is set out on pages 33 to 36 of the Transcript. No suggestion whatsoever of an issue of waiver, estoppel or acquiescence was raised at any place in this pleading. The plaintiff limited itself solely to the issue of whether or not the alleged mistake was sufficient to avoid the contract, whether defendant Kostelac was guilty of negligence in connection with the making of the mistake and whether two specifically listed provisions in the contract preclude rescission for mistake.

It is now well established in the Federal Courts that affirmative defenses of the type herein discussed are not available at the trial or on appeal in such a case, if not pleaded. *Rule 8, Rules of Civil Procedure, Title 28, U. S. C. A., p. 253,* is as follows:

"(c) *Affirmative Defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively . . . estoppel, . . . laches, . . . release, . . . waiver, and any other matter constituting an avoidance or affirmative defense . . . "

There would appear to be no ambiguity at all in this rule, and the Courts have clearly so held. *Bowles v. Capitol Packing Co.* (Ct. of Appeals, 10th Cir., 1944), 143 Fed. (2d) 87; *Wackerle v. Pacific Employers Insurance Company* (Court of Appeals, 8th Cir., 1955), 219 Fed. (2d) 1.

No exceptions to this rule are found, unless the parties have somehow waived such pleading requirement. In fact in one case the issue of estoppel was held to be unavailable, even though it was pleaded, since the pleading was defective, and did not contain all the necessary elements. *Fancher v. Clark* (U. S. D. C., D. Colo., 1954), 127 Fed. Supp. 452.

B. The Pre-Trial Order Listed All the Issues, and Contained No Provision for Such Contention.

In the trial of this case, largely because of geographical considerations, the parties entered into a very complete stipulation as to facts, which was incorporated into the formal Pretrial Order on May 11, 1956 (Tr. 53 through 73). Again, any reference whatsoever to any waiver or loss by defendant Kostelac of his right to avoid or rescind the contract is completely lacking from the entire document. In addition, the parties set forth their contentions beginning at page 65, through page 70. The identical issues referred to above in the pleadings were the only issues listed as *"Plaintiff's Contentions"* on the rescission issue (Tr. 67-68).

Those "Contentions of the Parties," as set forth in the Pretrial Order, were the only issues in the case, and the following statement was contained therein (Tr. 70):

> *"Issues of Law and Fact.*
>
> *"The issues of law and fact are set forth in the respective contentions of the parties, as hereinabove stated."*

At the end of the Pretrial Order (Tr. 73) the following statement is made:

> "The foregoing Pretrial Order has been approved by the parties hereto, as evidenced by the signatures of their counsel hereon, and this order is hereby entered, as a result of which the pleading pass out of the case, and *this pretrial order shall not be amended except by Order of the Court pursuant to agreement of the parties or to prevent manifest injustice.*" (Emphasis supplied.)

Pre-Trial procedure is established by Rule 16 of the Federal Rules of Civil Procedure, Title 28, U. S. C. A., page 623. Among other statements, in said Rule 16 is the following:

> ". . . and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice".

Here, again, it is difficult to see how there could be any ambiguity about the Pretrial order and the agreements set out therein or any ambiguity about Federal Rule 16. We note furthermore that such a Pretrial Order has been construed in the case of *Fancher v. Clark*, supra, under this Point II, and held to preclude issues not raised therein (l. c. 458):

> "Finally, the pre-trial stipulation and order in specifying the issues reserved for determination at the trial, do not refer to any claimed estoppel."

We have set out in the Transcript the Motion for Summary Judgment (Tr. 19-26), and the long Memorandum answer of plaintiff to such Motion (Tr. 27-52), to show that no such issue of waiver, estoppel or acquiescence was ever raised therein either. It would be difficult for the parties in any case to make it more emphatically clear what the issues were in the case.

III. PLAINTIFF MAY NOT RECOVER ON THE BOND IN THIS CASE.

Although we feel strongly that the points raised above would fully preclude plaintiff from recovery herein, there is another defense that should also deny recovery under the bid bond which plaintiff seeks to enforce by this action. This defense is that the bond herein contains a condition which has not been proved by plaintiff.

This bid bond, attached to Exhibit 1 herein, provides for liability by defendants, in the event of default, the amount of liability being "the difference between the amount specified in said bid and the amount for which the Government may procure the required work and/or supplies, *if the latter amount be in excess of the former* . . ."

Contrary to such express provision of this bond, the evidence conclusively shows that the re-let contract was for a smaller amount of money than the Kostelac contract, rather than "in excess" thereof, and therefore there has been a failure of proof of liability under the bond. (See Exhibit 3, showing that Kostelac's bid price was $158,339.64 whereas the re-let contract was for only $53,976.24. *And the Court has entered a judgment for the amount by which the re-let contract is less than Kostelac's contract.*

The plaintiff chose to ignore the wording in the bond in this case, and we presume (without pleading or proof) that plaintiff considered this wording to be an error of some sort. Although the matter was specifically raised by us in our pleadings (Tr. 10), our motion for Summary Judgment (Tr. 22-23) and our "Contentions" in the Pretrial Order (Tr. 70), nevertheless, plaintiff has never sought a reformation of the bond, alleged any grounds therefore, or shown by any proof that the wrong bond

form was used (or whatever plaintiff's explanation might be for the bond saying what it does).

We think that plaintiff may not intentionally ignore and disregard the fact that their evidence fails to show liability under the provisions of this bond. We feel that we as defendants are entitled to have a mistake alleged, if there was a mistake, and to have proof (actually it should be "clear and convincing") as to why the bond should be reformed, as plaintiff obviously feels it must be. We do not feel that the words "in excess of" can be construed to mean "less than", without supporting allegations and proof, and therefore a judgment on the bond cannot stand.

Lumber Underwriters of New York v. Rife (1915), 237 U. S. 605, 59 L. Ed. 1140, 35 S. C. 717;

Northern Assurance Company of London v. Grand View Building Association (1906), 203 U. S. 106, 51 L. Ed. 109, 27 S. C. 27;

Springfield Fire and Marine Ins. Company v. Martin (Ct. of Appeals, 5th Cir., 1935), 77 Fed. (2d) 492;

Aetna Indemnity Co. v. Baltimore, etc. Ry. Co. (Md., 1912), 117 Md. 523, 84 Atl. 166;

Garage Equipment Mfg. Co. v. Danielson (Wisc., 1913), 156 Wis. 90, 144 N. W. 284.

IV. THIS COURT MAY REVIEW AND MODIFY THE FINDINGS OF THE TRIAL COURT ON THE ISSUES HEREIN RAISED.

We have tried to show throughout this brief that almost all facts of any consequence on this appeal by defendants Kostelac and the Bonding Company are without any dispute, being based upon the five exhibits and the stipulations of the parties in the Pretrial Order. In fact, there is little relevant testimony on this appeal subject to any controversy. If this Court agrees with our views as to the law expressed herein, then this Court has jurisdiction to

reverse the judgment, since our points set out above are most of them based entirely upon stipulated facts.

Rule 52 (a), Rules of Civil Procedure, U. S. C. A., Title 28;
United States v. U. S. Gypsum Co. (1947), 333 U. S. 364, 92 L. Ed. 746, 68 Sup. Ct. 529;
Cyclopedia of Federal Procedure, 2nd Ed., Vol. 12, Sec. 6212, p. 271 et seq.

In *United States v. Gypsum Co.*, supra, the United States Supreme Court discussed at some length the effect of Rule 52 (a), which incorporated the prevailing equity practice into non-jury law cases. Findings by the trial Court were never conclusive on equity appeals, although great weight would be given to findings "when dependent upon oral testimony where the candor and credibility of the witness would best be judged" (l. c. 395).

The Supreme Court held that on an equity or non-jury appeal the Findings may be reversed if "clearly erroneous," and defined that term as follows (l. c. 395):

> "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the *definite and firm conviction that a mistake has been committed.*"

Sometimes reversals in such cases are put on a related ground that the question of "waiver," "estoppel" or "acquiescence" "is a question of law when the facts are ascertained."

Ray Motor Co. v. Stanyan (Me., 1923), 123 Me. 346, 122 Atl. 874;
Macey et ux. v. Furman (Wash., 1916), 90 Wash. 580, 156 Pac. 548;
Mudsill Mining Co. v. Watrous (Ct. of App., 6th Cir., 1894), 61 Fed. 163.

CONCLUSION.

For the reasons set out above it is respectfully submitted that the judgment of the lower Court should be reversed, with directions to enter judgment for both defendants.

EISENHOWER, HUNTER, RAMSDELL & DUNCAN,
TENNEY, DAHMAN & SMITH,
Attorneys for Defendants-Appellants, Mike H. Kostelac and Maryland Casualty Company, a Corporation.